

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs May 21, 2008

**STATE OF TENNESSEE V. JAMES BERNARD SIMPSON**

**Appeal from the Criminal Court for Sullivan County  
No. S53,226 Robert H. Montgomery, Jr., Judge**

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**No. E2007-02383-CCA-R3-CD - Filed September 5, 2008**

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Appellant, James Simpson, pled guilty to violation of an habitual traffic offender order, violation of vehicle registration and driving under the influence (“DUI”), second offense. The trial court sentenced Appellant to three years as a Range II Multiple Offender for violation of an habitual traffic offender order, thirty days with a seventy-five percent release eligibility for violation of vehicle registration, and eleven months and twenty-nine days at seventy-five percent release eligibility of which forty-five days were to be served day-for-day for DUI, second offense. Appellant requested a hearing on alternative sentencing. Following a hearing, the trial court denied all versions of alternative sentencing based upon the length and nature of Appellant’s prior criminal history, as well as his past failures to conform to conditions when given probation or after having his drivers’ license revoked. We have reviewed the record on appeal and find that it supports the trial court’s decision. Therefore, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Deborah B. Lonon, Assistant Public Defender, Blountville, Tennessee, for appellant, James Bernard Simpson

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Greeley Wells, District Attorney General; and Brandon Haren, Assistant District Attorney General, for the appellee, State of Tennessee.

## **OPINION**

### **FACTUAL BACKGROUND**

The State offered the following proof at the guilty plea hearing:

[O]n August the 3<sup>rd</sup>, 2006 Officer Brandon Bryson with the Sullivan County Sheriff's Department observed the defendant operating a black Toyota Supra on Fort Henry Drive, a location here in Sullivan County Tennessee. The officer observed erratic driving by the defendant and based upon that he stopped the vehicle, found the defendant to be the driver. He also observed the defendant to have an odor of alcohol. The defendant admitted drinking and after poor field sobriety tests the officer arrested the defendant for DUI. He checked his driving history and determined that he was, had previously been declared an habitual offender. He was declared in Sullivan County Criminal Court on May 19<sup>th</sup> of 1989 in Case No. S24,827. Additionally, he had a prior DUI conviction on February 18<sup>th</sup> of 2002 in Sullivan County General Sessions Court.

Subsequent to his arrest the defendant was transported to the Sullivan County Jail. After being read his rights for, under the Implied Consent Law he agreed to take a breath test. That was administered correctly after a 20 minute observation, the result showing that he had a .22 BAC at the time of the test.

Finally, the driver – or excuse me, the officer found that the registration plate of the Toyota was actually registered to a Jeep vehicle and so he was in violation of the registration law as well.

On May 23, 2007, the Sullivan County Grand Jury indicted Appellant for one count of violation of an habitual traffic offender order, one count of violation of vehicle registration, one count of DUI and one count of DUI, second offense. On July 12, 2007, the trial court accepted a guilty plea to violation of an habitual traffic offender order, violation of vehicle registration and DUI, second offense. Pursuant to the plea agreement, the trial court sentenced Appellant to three years as a Range II Multiple Offender and a fine of \$500 for Count One, thirty days with a seventy-five percent release eligibility for Count Two, and eleven months and twenty-nine days at seventy-five percent release eligibility of which forty-five days were to be served day-for-day for Count Four. These sentences were ordered to run concurrently. In addition, Appellant was prohibited from driving a motor vehicle for two years, ordered to complete a drug and alcohol evaluation, and pay a \$100 drug and alcohol addiction treatment fee.

Appellant asked the trial court for consideration of probation or alternative sentencing, specifically work release. On September 17, 2007, the trial court held a hearing regarding this request. Appellant was the sole witness at the hearing. He testified that he had multiple previous convictions for public intoxication, DUI and driving on a revoked license. He had been placed on probation in the past and could not remember any occasions of violating those probations. He had never taken drugs but had had many problems with alcohol. The night he was arrested, he had been drinking and had gotten into an argument with his girlfriend. In an effort to keep from escalating the situation, Appellant left the house and drove off in his car. At the time of the hearing, Appellant was renting a house from his foreman at his job. Appellant rode to and from work with his foreman everyday. He presented a letter from his employer that they were aware of the charges pending and stating that Appellant was a hard worker. The letter also stated that if Appellant was granted work release, someone would pick Appellant up at 7:30 a.m. for work and drop him off after the work day was completed. Appellant assured the trial court that if he was placed on some form of work release, he would quit drinking alcohol. Appellant stated several times that he could quit any time. When asked how he had started drinking again after going through alcohol and drug counseling, Appellant replied that he drank about a six-pack a night so he could relax. The pre-sentence report was also entered into evidence at the hearing.

At the conclusion of the hearing, the trial court stated the following:

[T]he reason behind the habitual traffic offender act is to say to certain people, you know, you need to show me, or a judge, that you ought to – that I’ve put down an order saying, a judge has put down an order saying you shouldn’t drive a motor vehicle because of your prior traffic history. And if you can’t show me that you can go for a period of time without committing new types of offenses then you shouldn’t just drive at all. And you’re in a situation where you have, you know, continued to – even though this order was down you’ve continued to make bad decisions and so in my opinion I can’t find that, you know, while as I say, you know, you’re a hard worker I can’t find that I can really trust you right now to make good decisions; that if I let you out on probation or alternative sentencing that you’d make good decisions because I don’t want to be in a situation where I’ve placed somebody on probation or alternative sentencing who would go out and drive a car and drive at a 22 level and then result in the death or injury to somebody out there on the road. I mean, you know, you’re 50 years of age. You’re old enough to have made the decision that, you know, am I going to live my life making the decision, while I may still drink I can’t drive. And so far you’ve not shown me that you’ve made that decision. You’ve shown me that – I mean you’ve told me that from time to time you can make the decision not to drink but your record shows me that I really, I can’t trust you on probation right now. And so I’m going to make the decision that – because, you know, you’ve had, I mean you’ve had a felony sentence that you’ve been ordered to serve. You’ve had community corrections. You’ve had split confinement. And, you know, looking at all the things that I’m supposed to look at as a judge, that in my opinion they far and away outweigh – there are no mitigators that I find in this

situation and that the best interest of society, as well as you, are best served by me ordering you to serve this sentence.

So I'm going to order you serve your three year sentence as a Range II offender in the Tennessee Department of Corrections.

### ANALYSIS

On appeal, Appellant does not argue against the length of his sentence but argues that the trial court erred in denying his request to an alternative sentence. "When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). Furthermore, with regard to probation, a defendant whose sentence is ten years or less is eligible for probation. T.C.A. § 40-35-303(a).

However, all offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, “[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed.” T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant’s untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein pled guilty to violation of an habitual traffic offender order, a Class E felony and sentenced to less than ten years. Therefore, he is eligible for alternative sentencing including probation. *See* T.C.A. §§ 40-35-102(6) & -303(a). However, because Appellant was sentenced as a Range II Multiple Offender, he does not qualify for favorable status consideration with regard to determination of the imposition of an alternative sentence. *See* T.C.A. § 40-35-102(6); *Carter*, 254 S.W.3d at 347. In addition, we point out that the above considerations are advisory only according to statute. *See* T.C.A. § 40-35-102(6).

We have reviewed the record on appeal and find that the trial court considered the sentencing principles and all pertinent facts in the case, therefore, there is a presumption of correctness in the findings of the trial court. The trial court first went through the enhancement and mitigating factors. “[E]nhancement and mitigating factors are relevant to the trial court’s determination of the manner in which a felony sentence is to be served.” *State v. Souder*, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002); *State v. Bolling*, 75 S.W.3d 418, 421 (Tenn. Crim. App. 2001). The trial court found that several enhancement factors applied: (1) previous history in addition to those necessary to establish

the appropriate range; (8) Appellant failed to comply with the conditions of a sentence involving release in the community; and (10) Appellant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(1), (8), (10).

With regard to Appellant's prior record, the pre-sentencing report shows an extensive criminal history. Appellant was fifty years old at the time of the sentencing hearing. The first offense in his pre-sentence report occurred when he was eighteen years old. Between this first arrest and the time of the sentencing hearing, Appellant had twenty-two convictions for public intoxication, four convictions for DUI, two convictions for driving on a revoked license, as well as convictions for domestic assault and vandalism, sexual battery, aggravated kidnapping, assault, petit larceny, disorderly conduct and resisting arrest. The trial court placed great weight on the length and extensive nature of Appellant's criminal history when denying an alternative sentence.

Also, Appellant was arrested on May 24, 1988, for driving on a revoked license. Less than two months later, on July 6, 1988, Appellant was again arrested for driving on a revoked license. Appellant was ultimately convicted of both offenses. Another incident of failing to comply with conditions of a sentence other than incarceration was when Appellant was placed on probation for eleven months and twenty-nine days on July 6, 1988, for a DUI that occurred July 2, 1988. Appellant was subsequently arrested for public intoxication on December 28, 1988, January 14, 1989, and June 3, 1989, as well as possession of a weapon on January 14, 1989. The trial court placed great weight on these incidents as proof that Appellant cannot conform with a sentence other than incarceration. The trial court also found that Appellant's driving while his blood alcohol level was .22 was extremely threatening to human life.

We find that the trial court correctly denied any form of alternative sentencing. Appellant has an extensive history of criminal convictions, including numerous alcohol-related convictions. His lengthy and extensive criminal history coupled with the fact that Appellant has been unable to conform with restrictions placed upon him when given a sentence that did not involve incarceration and the circumstances of the offense put human life at great risk

### **CONCLUSION**

For the foregoing reasons, we affirm the judgments of the trial court.

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JERRY L. SMITH, JUDGE